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IN THE

Supreme Court of the United States

October Term, 1974

No. .....

SRECKO KNEZ,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Srecko Knez petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on February 6, 1975.

Decision Below.

The decision of the court of appeals, rendered without opinion (Appendix A, *infra*, p. 1), has not been reported.

Jurisdiction.

The judgment of the court of appeals (Appendix A, *infra*, p. 1) was entered on February 6, 1975. On March 18, 1975, an order staying issuance of mandate was entered by the court of appeals for the ninth circuit (Appendix B, *infra*, p. 2) providing petitioner the opportunity to file this petition for writ of certiorari on or before April 4, 1975. This Court has jurisdiction under 28 U.S.C. 1254(1).

Questions Presented.

Whether deportation of an alien for conduct engaged in long after he had become firmly settled in the United States and assimilated into the American culture, is far beyond the scope of the plenary power of Congress to control immigration, and is, *de facto*, punishment imposed for the deterrence of such conduct which is:

(i) so unjustifiably discriminatory as to be violative of those elemental rights to equal protection of the laws embodied within the due process clause under the Fifth Amendment, and

(ii) cruel and unusual punishment of persons who are assimilated into the culture of the United States and thus violative of the Eighth Amendment.

Constitutional and Statutory Provisions Involved.

United States Constitution.

Article I, Section 8, Clause 4, provides, in pertinent part, that:

"The Congress shall have Power * * * to establish a uniform Rule of Naturalization * * *."

The Fifth Amendment provides, in part:

"* * * nor shall any person * * * be deprived of life, liberty, or property, without due process of law; * * *"

The Eighth Amendment provides:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

Statute Involved.

Section 241(a)(11) of the Immigration and Nationality Act, as amended, 74 Stat. 505, 8 U.S.C. 1251(a)(11), provides as follows:

> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—* * *
>
> (11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of . . . any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the . . . sale, exchange, dispensing, giving away, . . ., or the possession for the purpose of . . . sale, exchange, dispensing, giving away, . . ., or exportation of . . ., marihuana, ...

Statement.

Petitioner, a twenty-one-year-old male alien, is a native and citizen of Yugoslavia. He was admitted to the United States for permanent residence on December 30, 1960, when seven years of age.

On April 26, 1973, in the Superior Court of California, County of Los Angeles, petitioner was convicted on his plea of guilty of violating Section 11530.5 of the California Health and Safety Code, relating to the possession of marihuana for purposes of sale. Petitioner was placed on probation for a period of three years, on the condition, among others, that he spend the first ninety days in the county jail.

On August 3, 1973, the respondent issued to petitioner an order to show cause and notice of hearing in deportation proceedings under Section 242 of the Immigration and Nationality Act, 8 U.S.C. 1252, alleging that petitioner was subject to deportation pursuant to Section 241(a)(11) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(11), on the basis of the aforementioned conviction.

A deportation hearing was held on December 4, 1973, at which petitioner, through his counsel, admitted factual allegations 1 through 4 contained in the order to show cause Appendix C, *infra*, pp. 3 and 4) and as to factual allegation number 5 admitted that there was a record of conviction, but contended that the conviction was invalid because the prosecutor failed to fully advise him of his Constitutional rights. He denied deportability on the charge contained in the order to show cause. The immigration judge determined that "[t]he record of conviction of the [petitioner] is binding in this proceeding and it is not permissible to go behind that record," and found, as a result of that conviction, "that the deportability of the [petitioner] has been established by evidence which is clear, convincing and unequivocal."

Petitioner appealed to the Board of Immigration Appeals stating one reason for his appeal: "[petitioner] challenges the validity of said conviction upon the ground that he was not fully advised of his Constitutional rights before entering a plea of [guilty] in said criminal proceedings."

On August 5, 1974, the Board of Immigration Appeals affirmed the decision of the immigration judge and dismissed petitioner's appeal (Appendix D, *infra*, pp. 5 and 6).

Petitioner filed a Petition for Review of Final Order of Deportation (Appendix E, *infra*, pp. 7-9) in the United States Court of Appeals for the Ninth Circuit on November 12, 1974, pursuant to Section 106(a) of the Immigration and Nationality Act, as added, 75 Stat. 651, 8 U.S.C. 1105a(a) contesting the validity of Section 241(a)(11), "as applied to aliens lawfully admitted to the United States for permanent residence", in that said statute constitutes a denial of the due process of law to which petitioner is entitled under the Fifth Amendment to the Constitution of the United States because said statute unreasonably and unjustifiably discriminates against petitioner and persons similarly situated, denying to them equal protection of the laws.

Respondent filed a motion for summary affirmance of the decision of the Board of Immigration Appeals dated August 5, 1974. On February 6, 1975, the Court of Appeals for the Ninth Circuit granted respondent's motion and affirmed the decision of the Board of Immigration Appeals (Appendix A, *infra*, p. 1).

REASONS FOR GRANTING THE WRIT.

POENA AD PAUCOS, METUS AD OMNES PER VENIAT. If punishment be inflicted on a few, a dread comes to all.[1]

1. The deportation statute in question is utterly without restriction as to the classes of aliens to which it applies and without time limitation following an alien's entry into the United States. Such a broad classification ignores the obvious distinction between the following suggested categories:

I. Aliens outside the United States seeking entry

a. for a temporary period;

b. for permanent residence;

II. Aliens in the United States for temporary purposes, such as visitors for pleasure, visitors for business, and students;

III. Aliens who have been admitted to the United States for permanent residence

a. who have recently arrived;

b. who are in probationary status fulfilling minimum time requirements for naturalization (3 to 5 years);

c. *who have resided in the United States for long periods of time, and have planted their roots in this country,* but nevertheless have not applied for naturalization.

This court has recognized that a significant distinction exists between aliens who have recently departed from their native homelands and those who have become firmly resettled elsewhere, in considering eligibility

[1] *Black's Law Dictionary,* Rev. 4th Ed.

for refugee status. To an alien *who has become firmly resettled in the United States and assimilated into the American culture,* deportation is punishment in the practical sense. It may deprive a man and his family of all that makes life worthwhile. Those who have their roots here have an important stake in this country. Their plans for themselves and their hopes for their children all depend on their right to stay. If they are uprooted and sent to lands no longer known to them, no longer hospitable, they become displaced, homeless people, condemned to bitterness and despair.

There is no logical basis for characterizing the conduct of *those who have firmly planted their roots in this country* as falling within the plenary power of Congress to control immigration.

The legislative history of the addition of "marihuana" to subsection (11) of Section 241(a) of the Immigration and Nationality Act makes it abundantly clear that the paramount concern of Congress was the control of narcotics. As noted in 1960 U.S.C. Cong. and Admin. News 3135 "[U]sually violations of laws relating to marihuana are but the forerunners of violations of other laws relating to dangerous and more addictive forms of narcotics. The ease with which marihuana can be obtained is undoubtedly one of the leading causes of the increased incidence of juvenile delinquency, and it stresses the urgent necessity for the enactment of this legislation." The only possible basis for "urgency" would be the effective curbing of conduct relating to marihuana and its use. The statute, *as applied to those aliens whose roots have been firmly planted in this country,* can have no other purpose than to curb the use of marihuana.

Petitioner, having been brought to this country at the age of seven, is but one example of the difficulty, if not impossibility, of establishing a logical relationship between a later involvement with marihuana and one's foreign origin. The statute in question, *as applied to firmly resettled aliens,* should be recognized for what it is—punitive in nature for the deterrence of narcotics use. Equal protection concepts embodied in the Fifth Amendment prevent its unequal application against persons in petitioner's circumstances.

2. Notwithstanding this court's previous determination that deportation does not constitute cruel and unusual punishment, it is unrealistic to fail to recognize that it is just that, *when applied to one whose roots have become firmly planted in our soil.* The effects of deportation upon such persons are far different from its effects upon persons who have fairly recently departed from their native lands. Previous determinations by this court do not appear to have considered this distinction.

3. There is now pending before this court the question whether the federal government may discriminate against aliens by denying to them federal civil service employment.[2] The deportation statute challenged here is analogous, *as it is applied to resident aliens firmly resettled in this country,* in that it imposes upon them greater penalties than are imposed upon citizens for the same narcotics related offenses.

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[2]*Mow Sun Wong v. Hampton,* 500 F.2d 1031, Cert. Granted June 10, 1974. (On March 3, 1975, the case was set for reargument.)

Conclusion.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD T. GRIFFIN and
C. ROBERT FERGUSON,
Counsel for Petitioner.

APPENDIX A.

Order Granting Summary Affirmance.

United States Court of Appeals, for the Ninth Circuit.

Srecko Knez, Petitioner vs. Immigation and Naturalization Service, Respondent. No. 74-3112.

Filed: Feb. 6, 1975.

Before: CHAMBERS and BROWNING, Circuit Judges.

Upon due consideration, the decision of the Board of Immigration Appeals entered August 5, 1974 is hereby affirmed.

/s/ Richard H. Chambers
/s/ James Browning
U.S. Circuit Judges

APPENDIX B.

Order Staying Issuance of Mandate.

United States Court of Appeals, for the Ninth Circuit.

Srecko Knez, Petitioner, vs. Immigration and Naturalization Service, Respondent. No. 74-3112, I.N.S. No. A12 601 104.

Filed: March 18, 1975.

Upon application of Richard T. Griffin, Esq., counsel for the petitioner, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41 (a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the petitioner herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before April 4, 1975.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

/s/ Richard H. Chambers
Richard H. Chambers
United States Circuit Judge.

March 14, 1975
Dated: San Francisco, Calif.

APPENDIX C.

Order to Show Cause and Notice of Hearing.

United States Department of Justice, Immigration and Naturalization Service.

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act.

United States of America: In the Matter of Srecko Knez, Respondent. File No. A12 601 104.

To: Mr. Srecko Knez, c/o Los Angeles County Jail, Los Angeles, California.

Upon inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;

2. You are a native of Yugoslavia and a citizen of Yugoslavia.

3. You entered the United States at New York City, New York on or about December 30, 1960;

4. You then entered as an immigrant;

5. You were on April 26, 1973 convicted in the Superior Court of California, County of Los Angeles of the Offense for wilfully, unlawfully, and feloniously have (sic) in your possession for sale a narcotic, to wit, Marijuana, in violation of Section 11530.5, California (sic) and Safety Code.

And on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law: Section 241 (a) (11) of the Immigration and Nationality Act, in that, you have been convicted of a violation of any law or regulation, governing or controlling the taxing, manu-

facture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation, or the possession for the purpose of manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of any of the drugs described therein: to wit, Marijuana, in violation of Section 11530.5, California Health and Safety Code.

Wherefore, you are ordered to appear for hearing before a Special Inquiry Officer of the Immigration and Naturalization Service of the United States Department of Justice at El Centro, Calif. on Aug. 20, 1973 at 9:30 A.M. and show cause why you should not be deported from the United States on the charge(s) set forth above.

Dated: August 3, 1973.

Immigration and Naturalization Service
/s/ Roy C. Boehm.
Acting District Director
Los Angeles, California

APPENDIX D.

United States Department of Justice, Board of Immigration Appeals, Washington, D.C. 20536. Aug. 5, 1974.

File: A12 601 104 - Los Angeles.

In re: Srecko *Knez*.

In Deportation Proceedings.

Appeal on Behalf of Respondent: Richard T. Griffin, Esquire, 301 East Colorado Boulevard, Pasadena, California 91101.

Charge: Order: Section 241(a)(11), I&N Act (8 U.S.C. 1251(a)(11)—Convicted of unlawful possession of marijuana.

Application: None.

This case is before us on appeal from an immigration judge's decision finding the respondent deportable as charged and ordering his deportation to West Germany. The appeal will be dismissed.

Respondent, a 20-year-old male alien, is a native and citizen of Yugoslavia. He was admitted to the United States for permanent residence on December 30, 1960. On April 26, 1973, he was convicted in the Superior Court of California, County of Los Angeles, of the offense of wilfully, unlawfully and feloniously having in his possession a narcotic, to wit, marijuana, in violation of section 11530.5 of the California Health and Safety Code. He was placed on probation for a period of three years. Thereafter, the Service commenced deportation proceedings. The immigration judge, by order dated December 4, 1973, found that the crime committed by the respondent comes without

the purview of section 241(a)(11) of the Act, and that deportability has been established by evidence that is clear, convincing and unequivocal.

On appeal, counsel challenges the validity of respondent's conviction for possession of a narcotic. The short answer to this contention is that we are bound by the criminal record and may not go behind it to review the evidence and render an independent judgment on the guilt or innocence of the alien involved, *Rassano v. Immigration and Naturalization Service*, 377 F.2d 971 (7 Cir. 1966); *Cruz-Sanchez v. Immigration and Naturalization Service*, 438 F.2d 1087 (7 Cir. 1971). Additionally, even if the respondent successfully expunges his convictions, he nevertheless, will still be deportable, *Matter of A-F*, 8 I&N Dec. 429 (AG. 1959.)[1]

For the foregoing reasons, the decision of the immigration judge is affirmed, and the appeal is dismissed.

ORDER: The appeal is dismissed.

/s/ Maurice A. Roberts
Chairman

[1]See *Dunn-Marin v. INS*, 426 F.2d 894 (9 Cir. 1970); *Tsimbidy-Rochu v. INS*, 414 F.2d 797 (9 Cir. 1969); *Cruz-Martinez v. INS*, 404 F.2d 1198 (9 Cir. 1969); cert. denied 394 U.S. 955 (1969); *Brownrigg v. INS*, 356 F.2d 877 (9 Cir. 1966); *Kelly v. INS*, 349 F.2d 473 (9 Cir. 1965), cert. denied 389 U.S. 932 (1965); *Garcia-Gonzales v. INS*, 344 F.2d 804 (9 Cir. 1965), cert. denied 382 U.S. 840 (1965). See also *Gonzalez de Lara v. United States*, 439 F.2d 1316 (5 Cir. 1971).

APPENDIX E.

Petition for Review of Final Order of Deportation (I&NS File No. A12 601 104).

United States Court of Appeals, for the Ninth Circuit.

Srecko Knez, Petitioner, vs. Immigration and Naturalization Service, Respondent. No. 74-3112.

Filed: Nov. 12, 1974.

Petitioner, Srecko Knez, by his attorneys, Griffin, Griffin & Jackson by Richard T. Griffin, alleges as follows:

I

This is an action for judicial review of a final order of deportation pursuant to Section 106 of the Immigration and Nationality Act, as amended, 8 U.S.C. 1105a.

II

The petitioner, who was born on August 31, 1953, in Crikrenica, Yugoslavia, presently resides in the City of Los Angeles (San Pedro), County of Los Angeles, State of California. He was lawfully admitted to the United States as a permanent resident on December 30, 1960, under Alien Registration Receipt Number A12 601 104.

III

The IMMIGRATION AND NATURALIZATION SERVICE is made the respondent in this action pursuant to Section 106(a)(3) of the Immigration and Nationality Act, as amended 8 U.S.C. 1105a(a)(3).

IV

On April 26, 1973, petitioner was convicted, on his plea of guilty, to violation of Section 11530.5 of the

California Health and Safety Code, for the possession for the purposes of sale of a quantity of marijuana.

V

On December 4, 1973, in deportation proceedings held at the District Office of the Immigration and Naturalization Service at Los Angeles, California, an Immigration Judge found the petitioner deportable under Section 241(a)(11) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1251(a)(11), and ordered that he be deported from the United States to West Germany if acceptable in said country, otherwise, to Yugoslavia. An appeal from the decision of the Immigration Judge was duly taken to the Board of Immigration Appeals, Washington, D.C. On August 5, 1974, the Board of Immigration Appeals rendered its decision sustaining the order of the Immigration Judge made on December 4, 1973, and petitioner's appeal was dismissed. Said order of the Immigration Judge is now final.

VI

The validity of said order of deportation has not been upheld in any prior civil or criminal proceeding.

VII

Petitioner contests the validity of Section 241(a)(11) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1251(a)(11), as applied to aliens lawfully admitted to the United States for permanent residence, in that said statute constitutes a denial of the due process of law to which petitioner is entitled under the Fifth Amendment to the Constitution of the United States because said statute unreasonably and unjustifiably discriminates against petitioner and per-

sons similarly situated, denying to them equal protection of the laws.

Wherefore, petitioner prays for an order setting aside the outstanding order of deportation against him and dismissing said deportation proceedings.

DATED: November 11th, 1974.

GRIFFIN, GRIFFIN & JACKSON,
/s/ by Richard T. Griffin
Richard T. Griffin
Attorneys for Petitioner

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1246

SRECKO KNEZ, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, a native and citizen of Yugoslavia who was ordered deported following his conviction for a narcotics offense, contends that the Immigration and Nationality Act, under which the deportation order was issued, deprives him of equal protection of the law and inflicts cruel and unusual punishment.

Petitioner entered the United States as an immigrant on December 30, 1960. On April 26, 1973, in the Superior Court of California at Los Angeles, he was convicted on his plea of guilty to possessing a kilo of marihuana for purposes of sale, in violation of Section 11530.5 of the California Health and Safety Code (West 1954).

At a deportation hearing on December 4, 1973, the immigration judge found petitioner deportable under Section 241(a)(11) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1251(a)(11), for having been convicted of a narcotics violation. In a writtten order on August 5, 1974, the Board of Immigration Appeals dismissed petitioner's appeal (Pet. App. D). The court of appeals affirmed (Pet. App. A). A stay of mandate was issued pending this Court's disposition of the case (Pet. App. B).

1. Petitioner contends that 8 U.S.C. 1251(a) deprives him of equal protection of the law because it fails to distinguish "between aliens who have recently departed from their native homelands and those who have become firmly resettled" in the United States (Pet. 6) and "imposes upon [resident aliens] greater penalties than are imposed upon citizens for the same * * * offenses" (Pet. 8).

Congress has specifically provided that the provisions for deportation "shall be applicable to all aliens belonging to any of the classes enumerated in [8 U.S.C. 1251(a)]" regardless of their date of entry into the United States (8 U.S.C. 1251(d)). This Court has stated that policies concerning the entry of aliens and their right to remain in this country "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference" (*Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589). "That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state" (*id.* at 587-588).

With respect to the congressional authority over deportation policy, aliens and citizens, quite obviously, are not similarly situated, and Congress may provide for the deprtation of aliens for conduct that would subject a citizen only to criminal liability or to no liability. See *Santelises* v. *Immigration and Naturalization Service*, 491 F.2d 1254, 1256 (C.A. 2), certiorari denied, 417 U.S. 968. Nor does the due process clause of the Fifth Amendment require Congress, in the exercise of its plenary power over deportation, to distinguish between aliens according to the length of time they have been in this country.

2. Petitioner's contention that his deportation constitutes cruel and unusual punishment was not made below and need not be considered here. In any event, "[i]t is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment" (*Mahler* v. *Eby*, 264 U.S. 32, 39). The proscriptions of the Eighth Amendment are thus inapplicable. See *Santelises* v. *Immigration and Naturalization Service*, *supra*, 491 F.2d at 1255-1256, and the cases there cited.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.